

December 2, 2002

Mr. Edward Clarke
Desk Officer for the Federal Maritime Commission
Office of Information & Regulatory Affairs
Office of Management and Budget
New Executive Office Building
725 17th Street, NW
Washington, D.C. 20503

Re: Federal Maritime Commission Docket No. 02- 15 (Passenger Vessel Financial
Responsibility -- Notice of Proposed Rulemaking) 67 Fed. Reg. 66352 (Oct. 31, 2002)

Dear Mr. Clarke:

We are writing on behalf of Norwegian Cruise Line ("NCL") in response to the invitation to submit comments with respect to the paperwork burden imposed by the information collection requirements in the above-referenced Notice of Proposed Rulemaking ("NPRM") and pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). 67 Fed. Reg. at 66356. NCL has a range of additional concerns which will be addressed in separate comments to be filed with the Federal Maritime Commission ("FMC" or "Commission") in Docket No. 02-15.¹ For the reasons addressed below, we request the Director of the Office of Management and Budget ("Director") to disapprove the proposed information collection requirements in their present form.

1. Background

Nearly forty years ago Congress enacted legislation to address a particular problem in the early development of the cruise industry. Specifically, certain "fly-by-night" operators with no assets or base of operations in the U.S. had sold cruises to the American public without bringing the ships to the U.S. thus leaving those passengers stranded at the pier with little recourse against those who had sold the tickets. Congress responded with enactment of Public Law 89-777, section 3 of which requires those offering transportation on board passenger ships operating out of U.S. ports to supply, in advance of selling tickets, satisfactory evidence of the operator's

¹ The NPRM requested comments on the paperwork burden within 30 days of publication, and comments on the underlying docket by January 8, 2003. 67 Fed. Reg. 66352, 66356 (Oct. 31, 2002).

financial responsibility or alternatively to provide a bond or other security against which the passenger could proceed in the event of non-performance.

In order to identify those established and responsible operators, the FMC's implementing regulations² have from the beginning provided a variety of ways to evidence financial responsibility. For those operators evidencing financial responsibility with a surety bond or guaranty, the FMC has always had in place a statutory ceiling on coverage, beginning with \$5 million and increasing it gradually to the current \$15 million ceiling. Recognizing the significant adverse impact it would have in the industry, the Commission never required dollar-for-dollar coverage beyond the ceiling, and, in fact, specifically requested that Congress amend the original statute to remove language with respect to the surety bond requirement that could have been read to require such coverage.

The implementing regulations allowed U.S.-flag operators with assets based in the United States to establish their financial responsibility by meeting certain overall net worth requirements, but without collateral earmarked exclusively for the benefit of passengers. They also required all passenger vessel operators to file semi-annual reports as to their operations including the amount of passenger revenue received for water transportation and all accommodations, services, and facilities relating thereto but not yet performed, i.e., Unearned Passenger Revenue, or "UPR". 46 C.F.R. 540.2(i).

Compliance with the financial responsibility requirements described above is evidenced by the issuance of a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation ("Performance Certificate"). In addition, the Commission also administers a related program with respect to proof of financial responsibility to meet liability incurred for death or injury to passengers, compliance with which is evidenced by issuance of a similar certificate known as a "Casualty Certificate."

Historically, the system has worked remarkably well, with "fly-by-night" operators kept out of the industry and with virtually no passenger failing to recover fares in the event of non-performance. Within the last two or three years, however, and in particular in the aftermath of the September 11th terrorist attacks on our nation, several cruise lines ceased operations. Although there were adequate resources to cover most passengers who had booked passage on companies subject to the FMC financial responsibility requirements, one particular company fell short. That company had established its financial responsibility through self-insurance, and when it declared bankruptcy there were insufficient assets for every passenger to recover fares paid in advance. The Commission responded swiftly to that situation, and earlier this year eliminated self-insurance as an option for evidencing financial responsibility.³

² 46 C.F.R. Part 540 ("Passenger Vessel Financial Responsibility").

³ See discussion in preamble to NPRM. 67 Fed. Reg. at 66353.

2. The Proposed Rulemaking

The NPRM would eliminate the current \$15 million ceiling on coverage of UPR thus effectively requiring dollar-for-dollar coverage for every operator, regardless of the operator's financial wherewithal, track record in providing cruises or other evidence of financial responsibility. With hundreds of millions of dollars in UPR above the ceiling, this change alone will fundamentally reshape the structure and operations of the entire cruise industry, and in the Commission's words, will result in "tremendous cost and difficulty" for many operators.⁴ In addition to the elimination of the coverage ceiling, the NPRM proposes a new category of information, Excepted Passenger Revenue ("EPR"), to be tracked and reported by passenger vessel operators. EPR is a subset of UPR and is intended to reflect those situations where payment has been made by credit card by the passenger within 60 days of the date the passenger is scheduled to embark on the cruise. 46 C.F.R. 540.2(i)(2) (proposed).

The proposed rule includes a provision for addressing passenger complaints through an unusual alternative dispute resolution ("ADR") mechanism, originally developed by the Commission for another purpose. Although participation is characterized as voluntary because the original system requires the consent of both parties, the NPRM takes the unprecedented step of requiring the passenger vessel operator to consent in advance to use of the ADR procedure as a term of the surety bond, guaranty or escrow account agreement, one of which is required before a Performance Certificate will be issued.⁵ Because an operator is prohibited from embarking passengers in U.S. ports without a Performance Certificate, the NPRM makes use of the ADR system mandatory for the operator. This mandatory requirement raises a variety of legal issues, as well as triggering an entirely new paperwork burden beyond the conventional means operators have used to address consumer complaints.

The proposed rule would also make a number of more technical changes affecting the issuance of both Performance Certificates and Casualty Certificates, including increasing the reporting requirement from semi-annual to quarterly reports, adding new penalty provisions for failure to file reports on a timely basis, and making a variety of other changes. Finally, the proposed rule does not provide any transition mechanism, or phased-in effective date, thus dramatically increasing the burden on the industry to meet these significantly enhanced financial responsibility requirements.

3. The Time and Cost Requirements of Complying with the NPRM Have Been Significantly Underestimated by the FMC and Are Potentially Very Burdensome to the Cruise Industry and Those with Whom It Does Business

The FMC has significantly underestimated the impact the proposed rule would have, not only with respect to the paperwork burden which we address below, but on the manner in which

⁴ 67 Fed. Reg. at 66353.

⁵ 67 Fed. Reg. at 66355.

the modern cruise industry has done business since its inception forty-some years ago. Simply stated, the industry has always relied on advance passenger fares to meet the industry's working capital requirements. The Commission is well aware of this.⁶ What the Commission has failed to recognize, however, in its proposed rulemaking is the total restructuring that will be required of a multi-billion dollar industry – and apparently all to be done instantaneously, without even the benefit of a transition period. While we intend to address these issues in detail in our comments in the pending docket at the FMC, we do want to use this opportunity to explain how the Commission has also underestimated the resulting paperwork burden of the NPRM on the industry.

In order to be able to assess the basis for the Commission's analysis of the burden on the public, we have filed a request under the Freedom of Information Act seeking, among other things, all documents supporting, establishing or setting forth the bases for the stated estimates of the public burden in collecting and reporting the information required under the proposed rule.⁷ We do not yet have that information.

(a) The time and cost necessary to gather the information required to complete the new forms and to meet the quarterly reporting requirements far exceed the Commission's estimates

The Commission has submitted to the Office of Management and Budget for review under the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.*, the reporting requirements set forth in sections 540.8 and 540.26 of the proposed rule as well as the revised application form FMC-13 1 with accompanying vessel schedules (Form FMC-13 1 -VS). The estimated time burden to comply with the reporting requirements for what the Commission has determined to be the universe of respondents is 504 hours, and to complete the forms, an additional 180 hours. We believe these estimates fall significantly short of the time necessary to collect the necessary information and to report it as required.

(1) Application Form and Required Vessel Schedules

The NPRM proposes a new application form and vessel schedules which are required to be completed by vessel operators. The Commission states that there are "42 respondents" which presumably is the number of passenger vessel operators who currently hold Performance and/or Casualty Certificates issued by the Commission.

⁶ An FMC fact finding investigation reported that passenger vessel operators "must make a number of purchases for such matters as au-line tickets, hotel rooms, rental cars, food fuel and other supplies.. . [which] are paid in advance of a sailing," and "it is the industry's practice to use . . . [advance passenger payment funds] as working capital." FMC Fact Finding Investigation No. 19 (April 11, 1991) by order of the Commission 55 Fed. Reg. 34610 (Aug. 23, 1990)

⁷ Letter from counsel to Bryant VanBrakle, Secretary, Federal Maritime Commission requesting, pursuant to the Freedom of Information Act, information related to the NPRM (November 21, 2002).

The application form (Form FMC- 13 1) requires:

- basic background information about the applicant, including contact information,
- description of the legal organization and related details,
- name and address of the registered agent,
- number of vessels covered by the application,
- power of attorney, if the person signing the application is not a corporate officer, or partner in a partnership, and
- a separate vessel schedule form for each vessel.

The vessel schedule form (Form FMC-13 1-VS) requires:

- Identification of the vessel,
- Any previous name or identifiers of the vessel,
- Details as to passenger capacity, including a breakdown of 3rd and 4th berth capacity,
- Full information on fare structure, broken down by number of passenger berths in each price category,
- Payment policy, including the percentage of payment due at each of four specified intervals before the sailing date,
- Identification of “all principals” including legal name, and trade name, as well as other background information. Principals include the following: owner, marketing agent, ticket/contract issuer, parent company, operator, technical manager, time charterer, bareboat charterer, space charterer, and any person who can be considered to be “arranging, offering, advertising, or providing passage” on the vessel ⁸,
- Copies of the U.S. cruise itinerary,
- Specimen copy of the passenger ticket/passage contract,
- Documentation of payment policy,
- Documentation of cancellation policy,
- Copies of corporate organization documents, partnership agreements or other proof of the principals’ names,
- Copies of all applicable charter agreements, and
- Power of attorney for person signing the vessel schedule.

As noted, the Commission estimates that there are 42 respondents who apparently would be completing these forms and that this process would require a total of 180 hours. Although the Commission does not provide evidence of the number of vessels covered by the program, it is

⁸ It is not clear from the form whether identification of the retail travel agents is required. With some 17,000 travel agents selling cruises in the North American cruise market, this reporting requirement could potentially be very daunting.

estimated that there are roughly 100 separate cruise vessels that call at U.S. ports.⁹ Assuming that each of the respondents must complete Form FMC- 13 1, and that a form must be completed for each of the 100 vessels, it would appear as though the Commission is estimating that the exhaustive list of information outlined above can be researched and compiled in about 75 minutes per form.

The complexity of the ownership, operating, marketing and pricing arrangements that characterize the modern cruise industry can not be so neatly summarized, let alone in a little over an hour. Some of the required information is in a constant state of flux, raising the question of how often the forms must be supplemented. The proposed reporting requirements prescribe a 5-day deadline for reporting a "material change in facts." Pricing in the cruise industry, for example, as it does in the airline industry, changes frequently, sometimes on a daily or even hourly basis. The published fares in travel brochures are regularly discounted and the subject of a wide variety of promotions. Keeping the Commission apprised with accurate pricing information, given the variety of ships, stateroom configurations, itineraries and pricing strategies would, by itself, be extraordinarily time consuming. Itineraries are also subject to change, sometimes on very short notice due to weather and other conditions.

(2) Reporting Requirements

In addition to the new forms, the NPRM would also increase the substance and frequency of the reporting requirements for passenger vessel operators, as well as increasing the penalties for failure to report on a timely basis. Once again, the Commission has underestimated the time required, and the burden imposed, on the cruise industry.

As noted, the frequency of the annual reports required to be submitted to the agency is increased from the current semi-annual requirement, to a quarterly requirement, thus effectively doubling the workload. In addition, new requirements have been added. Section 540.8 of the proposed rule would require every person receiving a Performance Certificate to report the following information four times a year, within 30 days of the close of each quarter:

- Calculation and reporting of the unearned passenger revenue (UPR) for each month during the quarter,
- Calculation and reporting of the excepted passenger revenue (EPR) for each month during the quarter,

⁹ Seatrade Cruise Review identifies some 261 cruise ships operating in ocean cruising worldwide as of February 1, 2002. Of these approximately 90 vessels are identified as operating in the North American cruise market at some time. Seatrade Cruise Review at p. 127 et seq (March 2002). It is estimated that there are at least another 10 vessels operating on inland waterways or that or below the 100 gross ton threshold, but are still subject to the Commission's Financial Responsibility requirements bringing the estimated total number of individual vessels to approximately 100.

- Report *within 5 days*, any material change in the facts previously reported to the Commission (material change defined to include any change in the required amount of coverage, as well as a change in principals)

In addition, similar reporting requirements are imposed with respect to Casualty Certificates under Section 540.26 of the NPRM.

The Commission estimates that the total time required to prepare these reports is 504 hours for the 42 respondents. Although not stated, we are assuming this is an annual estimate. If so, that would mean each respondent would spend 12 hours *per year* completing these two reports, or three hours per quarter. Once again, the estimate that this information could be researched and assembled in 90 minutes grossly underestimates what is involved in tracking this kind of information, even assuming there are not changes that trigger the 5 day requirement to research, prepare and file a supplemental report addressing the changes.

The new requirement to calculate EPR illustrates the potential complexity of the reporting requirement. EPR is defined to mean:

that passenger revenue received for transportation and all other accommodations, services, and facilities relating thereto not yet performed, when payment is tendered by the passenger within 60 days of the date the passenger is scheduled to embark through the use of a credit card that is subject to the provisions governing the correction of billing errors at 15 U.S.C. 1666. An extension of credit by the person arranging, offering, advertising or providing passage shall not be considered excepted passenger revenue.

46 C.F.R. 540.2 (i)(2) (proposed)

Most cruise tickets are sold through travel agents and according to the Cruise Line Industry Association ("CLIA") there are approximately 17,000 travel agents in the country who sell cruises to the traveling public. Because calculation of the EPR requires specific information about the details and timing of the purchase, the proposed regulation could potentially impose new and onerous reporting requirements on these 17,000 travel agents, most of whom are small businesses. In order to comply with this reporting requirement, passenger vessel operators will have to work with these agents to develop their own reporting systems to determine who made the actual sale, the precise timing of the sale, the type of credit card used and whether it is subject to 15 U.S.C. 1666, and other information needed to comply in an accurate and timely manner with Commission's proposed requirement.

Even the basic calculation of the UPR numbers is more complicated under the proposed rule. Although these figures are now required to be reported on a semi-annual basis, for those operators whose UPR figures are in excess of the current \$15 million ceiling, there has been no need to segregate out revenues attributable only to the transportation and related services because

the level of UPR was of no consequence once the coverage ceiling had been met. With the proposed elimination of the regulatory ceiling, there will be a need to implement far more detailed tracking and reporting mechanisms in order to reflect the actual revenues that are directly related to the water transportation so as to meet the regulatory definition.

We see no reasonable scenario in which the information required by the Commission could be researched, assembled, reported and updated as changes occur, in the 90 minute time frame per report contemplated by the Commission in its estimate of the regulatory burden. Under the best of circumstances the preparation and filing of these reports, even after appropriate monitoring systems are developed and put in place, will be a significant multiple of the Commission's estimate.¹⁰

(b) The Commission fails even to acknowledge, let alone provide, estimates of the significantly enhanced paperwork burden on the cruise industry resulting from the unprecedented requirement to participate in a new mandatory Alternative Dispute Resolution system to address passenger complaints

Perhaps the most telling example of the Commission's failure to estimate the paperwork burden on the cruise industry of the proposed rulemaking is its failure to even mention, let alone assess, the implications of the *mandatory* requirement that passenger vessel operators participate in an FMC administered alternative dispute resolution ("ADR") program with respect to complaints from their passengers. The regulations incorporate by reference the Commission's Alternative Dispute Resolution program, set forth in 46 C.F.R. 502.401 *et. seq.* Although the program clearly contemplates agreement by *both* parties to the dispute before the ADR mechanism is used to resolve the dispute, the NPRM effectively requires the passenger vessel operator to agree to use the ADR program as a pre-requisite to obtaining a Performance Certificate which it must have to operate in the United States.¹¹

The practical effect is to give the passengers the right to bring the cruise company to Washington, D.C. to resolve anything the passenger views as non-performance, from cold soup or surly waiters, to missed ports or cancelled cruises. We believe this proposed federally mandated use of an ADR program to be completely unprecedented and unwarranted. With an estimated annual number of 7.4 million cruise passengers in the North American cruise market this year¹² the likely paperwork burden for cruise ship operators is potentially enormous. While it is only good customer relations and in the cruise industry's own best interest to resolve passenger complaints promptly and fairly, a *federal regulatory requirement*, triggered by the passenger, will certainly result in a dramatic increase in the information that will have to be submitted to the Commission to address these kinds of issues. For this reason alone we believe the Director should disapprove the information collection requirements of the proposed rule.

¹⁰ Once we receive the response to our FOIA request on this issue, we will be in a better position to prepare a more meaningful time estimate.

¹¹ 67 Fed. Reg. at 66355.

¹² "Cruise Industry Rebounding at Record Pace in 2002," CLIA Press Release (Sept. 10, 2002) (Industry is on track

4. Request that the Director of the Office of Management and Budget Disapprove the Collection of Information Requirement as proposed

For the reasons outlined above, we believe that the Commission has significantly underestimated the paperwork burden on cruise operators and the entire cruise industry, including travel agents and others who are potentially involved in generating the information required by the proposed rule. Not only do the time estimates for providing the required information fall woefully short, but the Commission has failed entirely to address the very significant burden that will be placed on the industry by the mandatory requirement that cruise operators consent to the use of an entirely new federally administered alternative dispute mechanism to deal with passenger complaints. Accordingly, we request the Director to disapprove the proposed collection of information in the NPRM and so notify the Commission under the authority provided in 44 U.S.C. 3507.

We appreciate the opportunity to submit these comments.

Very truly yours,

PRESTON GATES ELLIS
& ROUVELAS MEEDS LLP

/s/

BY
William N. Myhre

cc: Bryant L. VanBrakle
Secretary, Federal Maritime Commission